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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1486

JOSEPH YUKI SOTOMURA and
GRACE FUMIYE SOTOMURA, *Petitioners,*

v.

COUNTY OF HAWAII, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the Supreme Court of Hawaii

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REPLY MEMORANDUM FOR PETITIONERS

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Respondent County of Hawaii's Brief in Opposition to the Petition urges denial of the Petition on grounds that the judgment below was not final, the case merely involves local property law within the exclusive province of the State, and location of a seaward boundary subject to movement by erosion cannot be res judicata.

A. The Judgment Below Was Final.

The judgment of the court below was:

> "Pursuant to the opinion of the Supreme Court of the State of Hawaii filed December 11, 1973, the judgment of the lower court is reversed and remanded for a relocation of the seaward boundary of Lot 3 along the upper reaches of the wash of waves as evidenced by the vegetation line, and a recalculation of the area of the subject property in accordance with said opinion." (App. 30-31)

The relocation of the boundary at the vegetation line is merely ministerial because the vegetation line was surveyed (Rec. Doc. 20, p. 141) just before the trial.[1] The map (Rec. Doc. 34) showing the location of that line was introduced in evidence without objection (Rec. Doc. 20, p. 140). The recalculation of the area of the property, using the surveyed vegetation line as the seaward boundary, is mere mathematics.

Respondent states that fixing the location of the vegetation line may raise federal issues for this court to determine, but does not suggest how such issues might be raised or what they might be. Petitioners submit that the federal questions were created when the court below dictated that the trial court should employ a novel method for relocating their seaward boundary. That edict fully adjudicated the rights of

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[1] The trial judge's determination of the fact of erosion, relied upon to justify relocation of the seaward boundary, was made by observation at the time of trial. There was no testimony or other evidence that any erosion had occurred before the date of summons. The County surveyor's map (Rec. Doc. 32) showing a new seaward boundary by survey done on May 13, 1970 (Rec. Doc. 20, pp. 7-9) was merely a relocation of the seaward boundary through adoption of a new monument, the debris line, as the criterion for locating the seaward boundary.

the parties and nothing now remains but for the trial court to give it effect. Unlike *Republic Natural Gas Co.* v. *Oklahoma,* 334 U.S. 62 (1948), cited by Respondent, this case does not involve any requirement that the parties come to an agreement concerning their respective rights or obligations, failing which there shall be further hearings below and determinations of those rights and obligations, all of which might give rise to additional federal questions. The trial court is powerless to do anything other than mechanically to carry out the mandate of the lower court.

B. The State's Reserved Power To Establish Rules of Property Must Be Exercised in a Manner Consistent With the Constitution.

Petitioners concede that real property law, generally, is for the State to formulate. It is unquestionably state law that has, until the ruling of the court below, created and protected that right in property which Petitioners, and owners of hundreds of miles of Hawaii shoreline property, have now lost. No more through its courts than through its executive departments or legislature, however, can a State constitutionally deprive an owner of vested property rights without both just compensation and an opportunity to be heard with regard to the taking. In this instance, land to which Petitioners held registered title was appropriated to the State through the simple expedient of redefining the term "high-water mark". By that device the court below substituted a new monument, the vegetation line, for the adjudicated monument, the seaweed line, as the monument controlling the location of Petitioners' seaward boundary.

Petitioners' title to land extending to and along "highwater mark" was registered in the State's

Torrens title system in 1962. Notwithstanding Respondent's assertion to the contrary (Brief For Respondent, p. 14), there was definitive Hawaii law, extant at that time concerning the meaning of "high-water mark". An opinion of the Attorney General of Hawaii of 30 years standing, never withdrawn, disputed or distinguished by any subsequent opinion, instructed the Territorial Surveyor that this monument was to be located by reference to the *tides,* without regard to the effect of *wind or waves,* because it meant either "mean high watermark" or "the limit reached by the neap tides, unaffected by wind or waves".[2]

This meaning of high-water mark, established by ordinary high tide elevations, was adopted by the Land Court in at least two cases in which the government contended the location of an applicant's seaward boundary should be established by reference to some other monument. One of these was *In Re Application of Cass,* No. 1225 in the Land Court of the Territory of Hawaii. In that case the Land Court judge held, in 1940, that a wall constructed by applicant upland from the neap tide average or the mean high tide, but probably below the line of the wash of the highest wave or the highest spring tide level, was situated on applicant's land rather than upon the government-owned shore. In the other case, decided in 1963, the government contended that the seaward limit of accretion to registered land should be either the line of vegetation or the line

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[2] Opinions of the Attorney General of Hawaii, No. 1589, September 1. 1932. The opening and concluding paragraphs of this opinion, which was gospel to Hawaii surveyors until announcement of other considerations by *In Re Application of Ashford,* 50 Haw. 314, 440 P.2d 76 (1968), are attached as Appendix 2 to this Reply Memorandum.

of debris on the shore. The Land Court judge ruled that high-water mark, to which the applicant's title extended, was the line of elevation of mean high water. *In Re Application of Castle,* No. 616 (Dowsett petition to register accretion) in the Land Court of the State of Hawaii. At the time of registration of Petitioners' title in the Land Court, there were no contrary decisions in contested cases and it was settled law in the Land Court that boundaries along high-water mark were measured along the line of mean high tide. Petitioners' boundary was established in conformance with that law, using the seaweed line, at or just above the elevation of mean high tide, as the high-water mark (Rec. Doc. 20, pp. 126-133, 154).

Respondents urge (Brief For Respondent, p. 11) that this Court is bound to recognize asserted state law, relating to establishment of littoral boundaries, expressed with clarity by a line of decisions. However, only one decision is cited: *In Re Application of Ashford,* 50 Haw. 314, 440 P.2d 76 (1968). As noted in the Petition, *Ashford* involved land having a boundary "ma ke kai," with respect to which neither the meaning nor location had been determined between the owner and the State. On the other hand, in the case at bar, the monument marking the limit of Petitioners' land had been determined in litigation between Petitioners' predecessors and the State eight years prior to the condemnation action. The fact that the boundary may move, as the monument by which it is ascertained moves, neither makes it less certain, nor equates it with the previously undefined monument "ma ke kai" considered in *Ashford.* The mobility of the monument affords no justification, either, for the court below, *sua*

sponte, to tie Petitioners' seaward line to another monument without awarding compensation for the property taken and without permitting Petitioners to be heard with respect to the taking. It was only compensation, not title, that was in issue on the appeal to the court below.

C. Petitioners Were Unfairly Denied the Benefit of Prior Adjudication.

The monument marking the limit of Petitioners' land was required to be, and was, identified and located in the title registration proceedings. It was required not only by the governing statutes (Sec. 501-51 and 501-74, H.R.S., App. 34 and 35), but also by the circumstance that determination of title to a particular tract necessarily involves ascertainment of its boundaries. *Oklahoma* v. *Texas,* 256 U.S. 70 (1920). The monument identified in this case was high-water mark and it was located along the seaweed line, approximating the line of mean high water. These were determinations of fact. In a subsequent action between the State and the owner, the State would be bound by the identification of high-water mark as the seaward monument and by the means adopted for locating it. If the State could not itself escape the effect of the registration decree, certainly fundamental fairness should preclude the lower court from gratuitously declaring some of Petitioners' property to be State-owned through the artifice of declaring the location of Petitioners' high-water mark monument now to be a matter of law.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

CLINTON R. ASHFORD

Attorney for Petitioners

APPENDIX 2

September 1, 1932.

OPINION No. 1589.

BOUNDARIES; HIGH WATER MARK:

In locating the boundary of land granted "to the sea", "to high water" or "to high water mark", the common law prevails and fixes that boundary at "ordinary high water mark", which in turn has been variously held to be at "mean" or "medium" high water mark and "the limit reached by the neap tides". The latter is probably controlling, although for all practical purposes they are substantially identical in these waters.

Honorable Robert D. King,
Territorial Surveyor,
Honolulu, T. H.

Sir:

In your letter of June 16 you request the opinion of this Department as to what should be considered the controlling boundary of private property granted by the government and by description running to the "sea", "seashore", "high water", "high water mark", etc. You state that the practice of your Department has always been to consider that the controlling high water mark extends as far landward as the tide flows.

Clearly grants to the "sea" in this jurisdiction are analogous to and coterminous with grants to "high water mark". The only question is as to what constitutes the high water mark which is controlling in grants of this sort.

* * * * *

I find nothing to indicate that "the common law of England, as ascertained by English and American decisions", and as applicable to this question in Hawaii, has been displaced by Hawaiian judicial precedent or Hawaiian usage.

The common law applicable to this point has been ascertained by English and American decisions to be that the controlling boundary of land granted "to the sea" or "to high water mark", is either "mean high watermark", or "the limit reached by the neap tides, unaffected by wind or waves". This definitely eliminates from consideration "the uppermost reaches of the tide", "the point as far landward as the tide flows", the equinoctial and spring tides and the effect of wind or waves.

The later decisions, in which a more precise and technical consideration is given to the various types of tides, would seem controlling as placing high water mark at "the limit reached by the neap tides", although it is possible that the court, should it ever be confronted with the necessity of drawing a fine distinction between this point and "mean high water", would adhere to the latter.

Should a contest ever arise, and the local court be called upon to decide definitely as to which standard is controlling, viz., mean high water or the limit reached by the neap tides, I feel that the court would probably adopt the latter, and that where you have precise records of observations enabling you so to do, it would be preferable for you also to adopt this standard.

However, in view of the substantial identity of the two, I feel that, in the absence of precise data as to the limit reached by the neap tides, you would be safe in adopting mean high water, which data you would usually have, and that in so doing, neither the interests of the government nor of private parties would be appreciably jeopardized.

Respectfully,

H. R. Hewitt,
Attorney General.